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Nos. 86-157 and 86-162

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES A. BAKER, III, SECRETARY OF THE TREASURY, AND LAWRENCE B. GIBBS, COMMISSIONER OF INTERNAL REVENUE, PETITIONERS

v.

ABORTION RIGHTS MOBILIZATION, INC., ET AL.

IN RE JAMES A. BAKER, III, SECRETARY OF THE TREASURY, AND LAWRENCE B. GIBBS, COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE HONORABLE ROBERT L. CARTER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY MEMORANDUM FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Page

Case:

Allen v. *Wright*, 468 U.S. 737 ..... 2, 3

Constitution and statute:

U.S. Const. Art. III 4

Internal Revenue Code, 26 U.S.C. 7428 4

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In our petitions, we explain in detail that the district court's determination to proceed to trial in this case in the face of decisions by this Court that clearly demonstrate that

respondents lack standing amounts to a judicial usurpation of power that warrants the issuance of a writ of mandamus. We reply here briefly to point out how respondents' own response to our petitions further strengthens that conclusion.

1. Respondents recognize that it is well settled that they cannot pursue this lawsuit unless they demonstrate a " 'personal injury fairly traceable to [petitioners'] allegedly unlawful conduct and likely to be redressed by the requested relief' " (Br. in Opp. 33, quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). Because respondents concededly do not complain about any actions of petitioners that are aimed at them or directly affect them, respondents attempt to satisfy this requirement by asserting that they suffer "personal injury" from the alleged preferential treatment of the Catholic Church by petitioners. They assert that the fact that the Catholic Church allegedly receives favorable tax treatment that respondents do not receive causes them some "stigmatizing injury" (Br. in Opp. 36-46) and, moreover, that this treatment harms respondents' ability to compete in the political marketplace because it "subsidizes the Church's (and its contributors') political activities, while denying respondents the same benefit" (*id.* at 49). Accordingly, respondents assert that elimination of the Church's tax exemption will alleviate their injury, even though it does not provide them any direct benefit, because it will yield equal treatment (*id.* at 54).

These contentions highlight the extent to which the district court's decision is irreconcilable with the well-established limitations on standing to sue to compel government action. Stripped to its essentials, respondents' allegation of "personal injury" is simply that the Catholic Church has received a tax benefit to which it is not entitled; because respondents are "competitors" of the Church in the political arena, anything that wrongly benefits the Church assertedly

harms respondents in a sufficiently personal manner to afford them standing. Approval of that theory of standing would drastically shift responsibility for the administration of the Internal Revenue Code from the Executive Branch to the courts. Any company could similarly claim standing to challenge the Internal Revenue Service's allowance of tax deductions to a business rival on the theory that an unjustified deduction causes direct personal injury to the complaining company by giving its competitor an unfair competitive advantage. Even IRS settlements of litigation viewed by a competitor as unduly favorable could presumably be challenged in court under this theory. The government's ability to administer the tax laws would be gravely impaired if every individual administrative tax decision made by the Internal Revenue Service were thus subject to judicial reexamination at the behest of third parties. Indeed, such claims could threaten to become a routine tactic of competition. In short, respondent's theory of standing is fundamentally at odds with the separation-of-powers concerns that underlie the standing doctrine.

2. Consideration of the actual relief that respondents conceivably could obtain in this lawsuit further demonstrates that the district court's decision upholding their standing contravenes the established principle that the courts should not be available to litigants who "seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties" (*Allen* v. *Wright*, 468 U.S. at 761). Respondents in their amended complaint seek declaratory relief—a statement that the government has violated the law in failing to revoke the Church's tax exemption—as well as injunctive relief in the form of an order directing petitioners to revoke the Church's tax exemption and to assess and collect back taxes due as a result of the revocation (C.A. App. 22-23). As a practical

matter, however, respondents cannot obtain any such relief in this lawsuit, even if they were to prevail entirely on all their contentions on the merits. An order by the district court here granting them the relief they seek would be as transitory as a rainbow.

The Catholic Church was long ago dismissed as a party from this suit—a decision with which respondents do not quarrel (see Br. in Opp. 4 n.2). If the district court entered an order directing petitioners to revoke the Church's tax exemption and to assess back taxes, the Church would remain free to challenge the revocation in a declaratory judgment action under Section 7428 of the Internal Revenue Code, or to challenge in normal fashion any deficiency asserted, either by filing a petition in the Tax Court or by filing a refund suit in district court. Because the Church is not a party to this litigation, the district court's decision here would have no res judicata or collateral estoppel effect in such later litigation. Thus, the issue of the validity of the Church's tax exemption would be resolved ultimately in another forum; any ruling here would be nothing more than a catalyst to the filing of another lawsuit. It is apparent therefore that respondents in this suit are seeking to exercise influence or control over the Executive Branch's allocation of its law enforcement responsibilities, not to obtain a binding resolution of a specific legal question. This Court has made it crystal clear that Article III does not permit them to invoke the courts for such a purpose.

For the foregoing reasons and those stated in our petitions, it is respectfully submitted that the petition for a writ of certiorari, or, alternatively, the petition for a writ of mandamus, should be granted.*

CHARLES FRIED
Solicitor General

SEPTEMBER 1986

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*We note that respondents have stated no objection to our suggestion (86-157 Pet. 25 n.13) that it would be appropriate for the Court to hold these petitions pending the Second Circuit's resolution of the appeal from the district court's order holding the Church in contempt.